

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Linda Happersett
Reilly Motors Inc
PO Box 747
Wautoma WI 54982

PECFA Claim #54982-0747-39
Hearing #02-27

FINAL DECISION

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed January 9, 2002, under §101.02(6)(e), Wis. Stats., and §Comm 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on February 18, 2003, at 201 West Washington Street, Madison, Wisconsin.

S T A T E M E N T O F I S S U E

By decision dated 12/21/01, the Department of Commerce ("the Department") denied reimbursement to the Appellant for costs associated with remedial clean-up. The Department denied the Appellant's request for reimbursement claiming that these were costs incurred after Wisconsin's Department of Natural Resources ("the DNR") approved the site for conditional closure. Pursuant to the Department's interpretation of Comm 47.30(2)(a)14 and 15, the Department characterized these costs as ineligible.

A hearing was held on February 18, 2003. On March 19, 2003 a follow-up phone conference was held. All parties were present and the discussion was recorded for the record.

Appearing in this matter were the following persons:

PARTIES IN INTEREST:

Linda Happersett
Reilly Motors Inc
PO Box 747
Wautoma WI 54982

(In Person)In Person
-

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Joseph R. Thomas
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison WI 53707-7838

The authority to issue a decision in this matter has been delegated to the undersigned by order of the Secretary dated July 2, 2002. The matter now being ready for decision, I hereby issue the following:

FINDINGS OF FACT

The following relevant facts were presented at the hearing.

By letter dated 1/31/00, from Sand Creek consultants to the DNR, Sand Creek consultants requested a variance from DNR regulations NR 141.25. NR 141.25 specifies the requirements for the proper abandonment of wells. The Appellant sought a variance from the requirements of NR 141.25 for two monitoring wells on its property.

By letter dated 2/10/00, from Sand Creek consultants to the DNR, Sand Creek consultants provided necessary documentation showing the proper abandonment of all monitoring wells located on the Appellant's property, including the ones that received a variance.

Sand Creek Consultants prefaced this letter with reference to the DNR's December 1999 correspondence to the Appellant in which the DNR approved the site for conditional closure based on two remaining contingencies:

1. The filing of a water use restriction deed, and
2. Receipt of proper abandonment of all site-monitoring wells.

On June 7, 2000 Sand Creek Consultants submitted Invoice #174 to the Appellant in the amount of \$3182.28.

On September 9, 2000 the DNR issued a letter to Petitioner indicating no further action was necessary on the site.

On October 19, 2000 Sand Creek Consultants submitted its final invoice, Invoice #253, in the amount of \$539.00.

The Department denied reimbursement for all costs included in both invoices. The Department also denied interest expense reimbursement for interest amounts associated with these non-eligible amounts.

During the hearing, the parties agreed to review the method that was used to determine the portion of interest attributable to ineligible expenses. Pursuant to discussions taking place during the first hearing and follow-up correspondence, the parties agreed to use the calculation method requested by the Appellant.

During the follow-up phone conference, the Appellant conceded that it was not contesting reimbursable costs in the amount of \$464.50, portions of which were included in both invoices and which reflected amounts associated with the filing of the land use restriction deed.

DISCUSSION AND CONCLUSIONS OF LAW

The Department's decision to deny reimbursement is based on Comm 47. 30(2)14 and 15. The Department argues that these regulations should be interpreted to make ineligible all of the costs reflected on Invoice #174 and #253 because the activity to which these invoices relate occurred after the DNR granted conditional closure on the Appellant's property.

Since the Department's decision to deny reimbursement was based on the fact the costs incurred were post-conditional closure costs, an initial determination needs to be made that conditional closure was in fact granted. Neither party was able to produce the DNR's December 1999 letter, which apparently gave conditional closure to the Appellant's property. However, this judge determined that the Appellant's reference to the DNR's December 1999 letter, in the Appellant's subsequent correspondence on

February 10, 2000 to the DNR, sufficiently establishes that conditional closure was granted by the DNR.

The next question to be addressed is whether the costs included in Invoice #174 and Invoice #253 are costs which should be considered integral to the remedial process or ones that are ineligible because of the conditional closure designation. The Appellant has the burden of proving to that the costs should be eligible.

The Department's argument was premised on the assumption that all post-conditional costs are ineligible for reimbursement. The Department relies on Comm 47.30(2)14 and 15 to support its position. Comm 47.30(2)14 specifically states that costs incurred after the DNR determines that no further remedial action is required, *except for abandonment of monitoring wells and finalization of site closure*, (italics added) are ineligible for reimbursement.

Eligibility for reimbursement of costs associated with the abandonment of monitoring wells is also addressed in PECFA UPDATE #15, dated March 2001 which is consistent with Comm 47.30(2)14 and 15. According to this update, most post conditional costs are not considered integral to the remedial clean-up process for reimbursement eligibility. This update seemingly provides contradictory guidance relative to post closure, abandonment of monitoring well, costs, however.

In its section Other Issues, "remedial costs after conditional closure is offered" are not eligible for reimbursement. In the next paragraph, the Department specifically excludes from these ineligible costs those that are associated with the "proper closure of monitoring wells and other post closure costs." In the next sentence, however, the

UPDATE states that at the time conditional closure is provided, a final claim should be submitted for reimbursement.

This judge is unable to determine how a final claim can be submitted for reimbursement of eligible costs, such as those associated with the proper closing of monitoring wells, if at the time of a conditional closure grant, the Appellant has to engage in activity to properly close these monitoring wells. The timing of when these costs are incurred necessarily seems to take place after the conditional closure is granted.

According to Comm 47.30(2)14 and PECFA UPDATE #15, therefore, in certain circumstances, closure costs associated with the abandonment of monitoring wells are reimbursable by the Department, despite the ambiguous language contained in the PECFA publication.

The question now to be decided is whether the costs included in the Appellant's two invoices are reimbursable because they reflect the kinds of expenses incurred for the abandonment of the monitoring wells that are specifically excluded from the ineligibility designation covered by Commerce regulations.

This Judge cannot ascertain from Invoice #174 and Invoice #253 the specific nature of the expenses incurred. While the Judge held a post-hearing telephone conference with the parties to establish the specific nature of the services rendered and offered to the Appellant another chance to enter into the record documentation to specify the underlying services, this information has not been produced.

The Appellant's follow up explanation, by letter dated March 24, 2003 to the Administrative Law Judge, states that the costs included in Invoice #174 reflects work

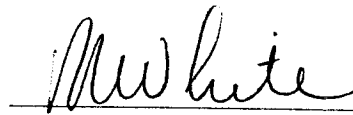
completed by the Project Manager, Geologist, and Administrative Assistant “related to project management, administration and clerical work, plus field equipment and mileage costs.” This generalized description is not rendered sufficiently specific by the Appellant’s explanation in a footnote, that an earlier invoice, Invoice #134, (which is not a part of this record), covered the physical abandonment of the monitoring wells, while the later Invoice #174 reflects costs for other correspondence and work related to “that activity.”

DECISION

Because the Appellant has the burden of proving that the costs reflected in Invoice # 174 and Invoice #253 are eligible for reimbursement, it needed to show that they were incurred specifically for the abandonment of the monitoring wells. The Appellant failed to do this, even though it had ample opportunity. The Department’s decision to deny reimbursement is affirmed.

NOTICE TO PARTIES

Dated: 4.7.03



Mari A. Samaras-White
Administrative Law Judge
Department of Commerce
PO Box 7970
Madison WI 53707-7970

copies to:

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In Person

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REQUEST FOR REHEARING/JUDICIAL REVIEW

Hearing #02-27
Commerce # 54982-0747-39

Request for New Hearing

Petitions for new hearings must be received no later than 20 days after the mailing date of this hearing decision.

If, after you receive the decision, you believe it was based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. **To ask for a new hearing**, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Your request must explain why you believe the hearing examiner's decision is wrong. If you have new evidence to submit, you must describe your new evidence and explain why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or on the discovery of new evidence which could not have previously been obtained through due diligence on your part, your request will be denied.

The petition for new hearing must also be sent or faxed to all other parties named in this decision as "PARTIES IN INTEREST." **Late requests cannot be granted.** The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on all other parties named as "PARTIES IN INTEREST". **Late requests cannot be granted.** The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: 4-7-03

PARTIES IN INTEREST:

Linda Happersett
Reilly Motors Inc
PO Box 747
Wautoma WI 54982

In Person

Joseph R. Thomas
Assistant Legal Counsel
Office of the Secretary
Department of Commerce

Date Mailed:	<u>4-7-03</u>
Mailed By:	<u>Laura Pleasants</u>